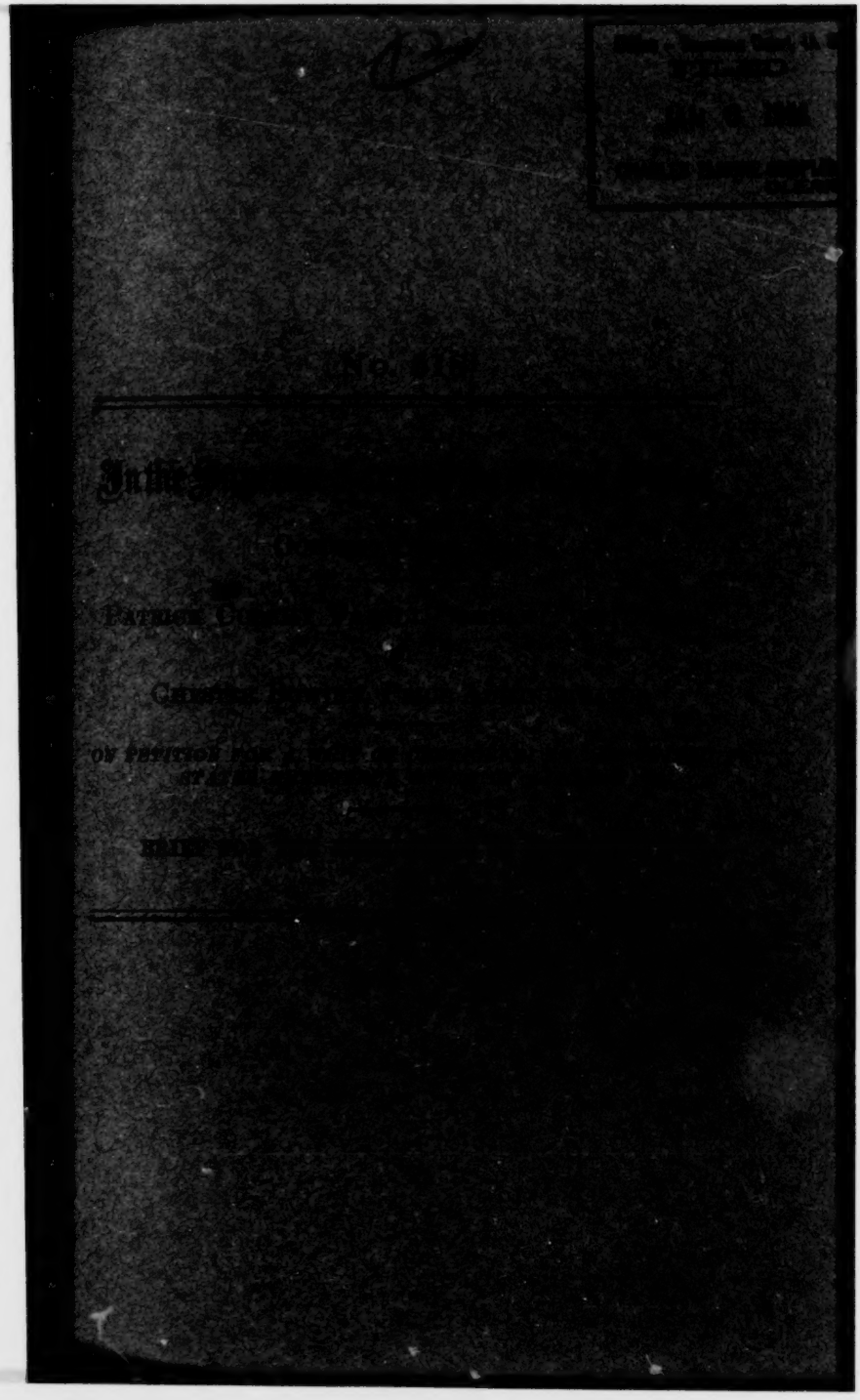

INDEX

CITATIONS

566659—44

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 518

PATRICK CUDAHY FAMILY COMPANY, PETITIONER

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 65–67) is not yet reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered on November 2, 1943 (R. 69). The petition for a writ of certiorari was filed December 1, 1943. Jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, as amended, 56 Stat. 23, 765 (sometimes referred to herein as "the Act").

QUESTIONS PRESENTED

1. Whether objections to the constitutionality of the Act or of Maximum Rent Regulation No. 35 were properly raised by petitioner in the Emergency Court of Appeals or decided inferentially by that court.

2. Whether the Administrator's determination that the "term" of complainant's lease did not commence on or prior to March 1, 1941, within the contemplation of an adjustment provision of Maximum Rent Regulation No. 35 was arbitrary, capricious, or otherwise contrary to law.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, are set forth in the Appendix, *infra* pp. 10–13 and those of Maximum Rent Regulation No. 35 at pp. 49–51, and 59 of the Record.

STATEMENT

On July 24, 1942, the Administrator issued Maximum Rent Regulation No. 35, effective August 1, 1942, establishing maximum rents for housing accommodations other than hotels and rooming houses in the Milwaukee Defense-Rental Area (R. 44–59). For accommodations rented on March 1, 1942, the Regulation established as maximum legal rents those in effect on that date.[1]

[1] Section 1388.3054 (a), (R. 47).

Section 1388.3055 (a) of the Regulation provides nine grounds[2] on the basis of which landlords may obtain an upward adjustment of maximum rents so established (R. 49–51). Procedural Regulation No. 3 sets forth the administrative procedure for obtaining such an adjustment.[3]

On October 29, 1942, the petitioner, as owner of certain housing accommodations in the Area which were rented on the maximum rent date, filed with the Area Rent Director a petition for adjustment of its maximum rent pursuant to Section 1388.3055 (a) (5)[4] of Maximum Rent Regulation No. 35. This Section (R. 59) provides for the granting of an upward adjustment of a landlord's maximum rent if

> There was in force on March 1, 1942, a written lease, for a term commencing on or prior to March 1, 1941, requiring a rent substantially lower than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on March 1, 1942 * * *.

In support of this petition it was alleged that (1) on March 1, 1942, petitioner's accommoda-

[2] On the date of the filing by petitioner of its petition for adjustment the Regulation provided seven grounds for adjustment of maximum rents (R. 49–51). Subsequently, two additional grounds were added, neither of which is material here.

[3] 7 F. R. 3936, 6081, 7149.

[4] Hereinafter referred to as "Section 5 (a) (5)."

tions were rented for $150.00 per month under a lease which had been in effect for more than one year prior to that date, the lease having been entered into originally on January 16, 1939, for a term of two years commencing May 1, 1939, and thereafter extended beyond March 1, 1942, by automatic operation of a renewal clause in the lease (R. 22), and that (2) the rents for comparable and identical accommodations in the same building were, on March 1, 1942, substantially higher than for the accommodations for which the increase was requested (R. 41).

On January 16, 1943, the Rent Director issued an order denying the petition (R. 43), and on February 1, 1943, petitioner filed a protest against that order with the Regional Administrator of the Office of Price Administration for the Sixth Region (R. 10).[5] The protest contained allegations substantially the same as those contained in the petition for adjustment (R. 11, 12). On May 21, 1943, the Regional Administrator issued an order denying this protest (R. 34). The denial of the protest, as explained in the opinion accompanying this order (R. 35–36), was based on the ground that the term of petitioner's lease did not commence on or prior to March 1, 1941, as required under Section 5 (a) (5) of Maximum Rent Regulation No. 35.

[5] Since the document filed by petitioner requested the Administrator to "review" the order of the Rent Director (R. 10), it was treated as a statutory protest pursuant to Section 11 of Procedural Regulation No. 3 (7 F. R. 3936, 6081, 7149).

On June 17, 1943, petitioner filed a complaint in the Emergency Court of Appeals, alleging that the Administrator was in error in failing to find that the lease under which its housing accommodations were rented on the maximum rent date was for a term commencing on or prior to March 1, 1941 (R. 1–4). On September 3, 1943, subsequent to the filing of briefs in the Emergency Court of Appeals by both petitioner and Respondent, petitioner filed a motion for leave to amend its complaint to set forth certain objections to the constitutionality of the Act (R. 61–62). This motion was denied by the court on September 23, 1943 (R. 63), and on November 2, 1943, the court dismissed the complaint, holding that the term of petitioner's lease did not commence on or prior to March 1, 1941, within the meaning of Section 5 (a) (5) of the Rent Regulation.

ARGUMENT

The decision of the Emergency Court of Appeals presents no issue of constitutional law and no issue of federal law of general significance. The validity of Maximum Rent Regulation No. 35 was not in issue in the proceedings before the Emergency Court of Appeals. Section 204 (a) of the Act prohibits the Emergency Court of Appeals from considering any objection to a Regulation or order unless such objection was first set forth in the protest underlying the complaint. Petitioner admits that its protest did not specifi-

cally set forth objections to the Regulation as required by Section 203 (a) of the Act, but argues that such a challenge was to be "naturally implied" from the protest (Pet. 17). The language of the protest does not, however, sustain this construction. The petitioner specifically alleged in the protest that it was directed against the order of the Rent Director; all of the objections set forth in the protest were directed against the order, not against the Regulation (R. 10). Moreover, Section 203 (a) requires a protest against the Regulation to be filed within a period of sixty days after the issuance of the regulation or order protested, unless grounds for protest arise after that period. The protest was filed more than six months after the issuance of the Regulation and is barren of any suggestion that it was based on new grounds. Since no objections against the Regulation were presented in the protest, none could be raised in the court below. Indeed, such objections were not even set forth in the complaint or in the proposed amendment thereto (R. 3–4, 61). Nor was the validity of the Regulation even impliedly ruled upon by the court below. The court expressly stated in its opinion (R. 65):

> What we said in *Armour & Co.* v. *Brown,* 137 F. (2d) 233 (1943) is applicable to this case: "A protest against an order denying an application for an adjustment does not open up for review the validity of the regulation itself, but only raises the question whether the Administrator was arbitrary

> and capricious in concluding that the applicant had failed to make out a case within the terms of the applicable adjustment provision."[6]

Similarly, the question of the constitutionality of the Act was neither raised by petitioner in its complaint nor passed upon by the court below. It is true that petitioner filed a motion in that court to amend its complaint in order to include certain objections to the constitutionality of the Act and that the motion was denied by the court without opinion. The denial of that motion will not be reviewed by this Court, however, as "the granting or refusal of leave to file an additional plea, or to amend one already filed, is discretionary with the court below, and not reviewable by this Court, except in a case of gross abuse of discretion." *Gormley* v. *Bunyan,* 138 U. S. 623, 630–631; *Chapman* v. *Barney,* 129 U. S. 677, 681; *Bullitt County* v. *Washer,* 130 U. S. 142, 145. In any event, the protest proceeding involved only the

[6] Contrary to petitioner's assertion that "this ruling of the Court amounts to a practical denial to virtually every person affected of ever having a Court's determination of the validity of the Regulation" (Pet. 15), the Administrator and the Emergency Court of Appeals have both recognized that the interpretation of ambiguous provisions may create new grounds for protest against the Regulation within the meaning of Section 203 (a) of the Act. *Galban Lobo Co. S. A.* v. *Henderson,* 132 F. (2d) 150, certiorari denied, 318 U. S. 756.

Furthermore, objections to the validity of the Act may be raised and considered as defenses in any court where proceedings are brought to enforce the Act.

question whether the Rent Director's order was in accordance with the adjustment provision.

The single issue properly presented to the Emergency Court of Appeals was whether the Administrator was arbitrary or capricious in concluding that the term of petitioner's lease did not commence on or prior to March 1, 1941, within the contemplation of Section 5 (a) (5) of the Rent Regulation. Accordingly, the court was not called upon to decide any question of local law; much less did it decide an important question of local law in conflict with local decisions or with any decision of this Court, as suggested by petitioner. As the court said in its opinion (R. 66): "It is recognized, of course, that matters concerning the title and disposition of real estate are determined by the law of the jurisdiction in which such property is located; but here the matter at issue concerns the interpretation of a regulation issued by a federal administrative agency." The sole effect of the decision was, therefore, to uphold the Administrator's interpretation of a section of the Rent Regulation in its application to the particular state of facts presented by petitioner's application for adjustment. Moreover, the court below was clearly right in holding that "the adjustment provision should have throughout the country a uniform interpretation conformable to the purposes of the rent regulation, irrespective of whether, under the law of a particular state, the

effect of the renewal clause would be to create a new term or to continue the old within the meaning of a local statute of frauds or recording act" (R. 66).[7]

CONCLUSION

The decision below is correct and does not warrant further review. The petition should therefore be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

RICHARD H. FIELD,
Acting General Counsel,
Office of Price Administration.

JANUARY 1944.

[7] The opinion below also answers the suggestion that under a loose reading of the adjustment provision relief should be afforded to a landlord who was bound by a lease executed at least a year prior to March 1, 1942. The petitioner could have given notice through March 1, 1941; the Wisconsin case cited by petitioner (Pet. 22, last line) indicates that the day for giving notice should be excluded in the computation; the opinion below does this, as 60 days remain after March 1, 1941, until the expiration of the original two-year term at the close of April 30, 1941. Petitioner was thus not bound for a year prior to March 1, 1942. Nor could its assent by silence to the renewal be deemed to become effective until the last moment of March 1, 1941, had expired, so that even any constructive execution of a new lease by silence was too late to come within any possible construction of the adjustment provision specifying a term commencing on or prior to March 1, 1941. The point is obviously of very particularized application.